No. 18-911

IN THE

Supreme Court of the United States

INTERMOUNTAIN HEALTH CARE, INC., *et al.*,
Petitioners,

v.

UNITED STATES EX REL. GERALD POLUKOFF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AND FEDERATION OF AMERICAN HOSPITALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MELINDA REID HATTON
MAUREEN D. MUDRON
AMERICAN HOSPITAL ASSOCIATION
800 Tenth Street, N.W.
Two City Center
Suite 400
Washington, D.C. 20001
(202) 638-1100

Counsel for American Hospital Association

JONATHAN L. DIESENHAUS
JESSICA L. ELLSWORTH
Counsel of Record
SARAH C. MARBERG
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5886
jessica.ellsworth@hoganlovells.com

Counsel for Amici Curiae

Additional Counsel:

KATHLEEN TENOEVER
ERIN RICHARDSON
FEDERATION OF
AMERICAN HOSPITALS
750 9th Street, N.W.
Suite 600
Washington, D.C. 20001
(202) 624-1500
Counsel for Federation of American Hospitals

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STATEMENT OF INTEREST

The American Hospital Association and Federation of American Hospitals respectfully submit this brief as *amici curiae*.[1]

The American Hospital Association (AHA) represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations. AHA members are

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties have consented to the filing of this brief.

committed to improving the health of the communities they serve and to helping ensure that care is available to and affordable for all Americans. The AHA educates its members on healthcare issues and advocates on their behalf so that their perspectives are considered in formulating health policy.

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems throughout the United States. FAH's members include teaching and non-teaching hospitals in urban and rural America, as well as inpatient rehabilitation, psychiatric, long-term acute care, and cancer hospitals. Dedicated to a market-based philosophy, the Federation provides representation and advocacy on behalf of its members to Congress, the Executive Branch, the judiciary, media, academia, accrediting organizations, and the public.

One way in which *amici* promote the interests of their members is by participating as *amicus curiae* in cases with important and far-ranging consequences for their members—including cases arising under the False Claims Act (FCA) and its *qui tam* provisions. *See, e.g.*, *Universal Health Servs., Inc.* v. *U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Schindler Elevator Corp.* v. *U.S. ex rel. Kirk*, 563 U.S. 401 (2011); *Rockwell Int'l Corp.* v. *United States*, 549 U.S. 457 (2007).

The question presented here is of tremendous importance to *amici*'s members because meritless *qui tam* lawsuits pose potentially devastating risks to hospitals of all sizes and forms and divert scarce resources from their core mission of providing care to patients and improving the health of their communi-

ties. *Amici*'s members are obvious targets in lawsuits brought by putative whistleblowers under the FCA; they are heavily regulated and operate complex organizations that receive a majority of their reimbursement for providing care from government healthcare programs.

Indeed, approximately *two-thirds* of the FCA cases filed in the past two years involved healthcare defendants. *See* U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1986-Sept. 30, 2018*, at 1, 3 (2018) (*DOJ Fraud Statistics*).[2] Would-be whistleblowers are often enticed by the prospect of windfall rewards and attorney's fees. And if the Department of Justice investigates and declines to intervene—as it does approximately 75 percent of the time—that leaves these private plaintiffs to pursue largely meritless cases with minimal supervision from the government. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 574 (2000) (relators "pursue different goals and respond to different incentives than do public agencies" and have no "direct accountability to the electorate").

The question here is whether private plaintiffs pursuing FCA claims should have to follow the same basic rules of civil litigation that apply to every other plaintiff pursuing a fraud claim, or whether they should be treated as a special class of plaintiff entitled to a court-made exception from those rules. *Amici* and their members submit that they should not be. Relaxing Federal Rule of Civil Procedure 9(b)'s particularity requirement, as the Tenth Circuit

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[2] A*vailable at* https://www.justice.gov/civil/page/file/1080696/download.

did below, allows whistleblowers to accuse a hospital or other defendant of fraud and proceed to discovery without first articulating the circumstances—or even the scope—of the alleged fraud and to do so based on as little as a hunch that fraud was committed.

The Tenth Circuit's relaxed standard strips away the protections Rule 9(b) affords other defendants. Discovery in FCA cases can be enormously expensive, even when it confirms that the relator could not plead the circumstances of any fraud because no fraud occurred. For all hospitals, the costs are an unnecessary diversion of resources from patient care; for community hospitals in particular, these consequences can be devastating. This Court should grant certiorari to restore the consistent application of the plain text of Rule 9(b) in all fraud cases, including those brought under the FCA.

SUMMARY OF ARGUMENT

Given the enormity and complexity of the statutory and regulatory regime governing healthcare, *amici* have a strong interest in ensuring that *qui tam* relators pursue only claims that are pled with the particularity required by Rule 9(b)'s exception-free plain text. Hospitals, physicians, and other providers are entitled to clear notice of the precise circumstances constituting the alleged fraud when they are accused of engaging in it. Enforcement of Rule 9(b)'s plain text is a necessary aid to discerning between cases prosecuted by legitimate relators with credible knowledge of undisclosed fraud and cases brought opportunistically by those drawn to *qui tam* litigation for financial gain. The costs of defending FCA suits are immense; every dollar spent defending against deficient complaints is an unnecessary

diversion of needed resources from providing patient care. There is no justification for relaxing Rule 9(b)'s heightened pleading standard.

The Tenth Circuit's endorsement of a *qui-tam*-relator exception to Rule 9(b) allows one class of plaintiffs to launch costly, meritless lawsuits alleging fraud without pleading particular details. The Tenth Circuit recognized that the relator's allegations below would otherwise be deficient, but instead of holding him to the particularity requirement, it excused the shortcomings on the basis that the relator alleged the details were in the defendant's exclusive control. *Amici* are concerned that the Tenth Circuit's decision, if not reversed, will undermine a critical requirement of FCA litigation: that only complaints with well-pled facts showing that the government actually received a false or fraudulent claim may proceed.

Rule 9(b) generally requires plaintiffs to plead "the who, what, when, where, and how" of a fraud without exception. *Ebeid ex rel. U.S.* v. *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks omitted). An exception that relaxes Rule 9(b) for relators increases the gamesmanship often seen in *qui tam* cases. It gives an "avoid-the-rule" card to a relator who simply has to speculate that false claims exist and that the defendant has exclusive possession of the evidence that would prove it. Doing so gives the relator license to conduct the exact sort of fishing expedition Rule 9(b) intends to police.

Amici support Petitioner's request that this Court grant its petition for writ of certiorari to ensure consistent application of Rule 9(b) across the Circuits and to all classes of fraud plaintiffs.

ARGUMENT

I. Rule 9(b) Plays A Critical Role In Protecting Defendants, Including In FCA Cases.

1. Being named a defendant in an FCA lawsuit carries with it all of the stigma of a fraud claim. A *qui tam* complaint therefore must satisfy Rule 9(b)'s pleading requirement that the party alleging fraud "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see Escobar*, 136 S. Ct. at 2004 n.6 ("[FCA] plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) * * * ."). Rule 9(b) "ensures that the relator's strong financial incentive to bring an FCA claim—the possibility of recovering between fifteen and thirty percent of a treble damages award—does not precipitate the filing of frivolous suits," *U.S. ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006), and shields defendants from "spurious charges of immoral and fraudulent behavior." *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (internal quotation marks omitted); *see also Ackerman* v. *Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999) (strict Rule 9(b) standard warranted because "public charges of fraud can do great harm to the reputation" of an entity or individual).

2. In the decision below, the Tenth Circuit acknowledged that Rule 9(b) requires *qui tam* relators to allege "the who, what, when, where and how of the alleged claims." Pet. App. 29a-30a (quoting *U.S. ex rel. Lemmon* v. *Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010)). But the court then "excuse[d] deficiencies that result from the [relator's]

inability to obtain information within the defendant's exclusive control." Pet. App. 30a. Joining the D.C., Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits, the Tenth Circuit below diluted the stringent Rule 9(b) pleading standard for relators who assert that the defendant has exclusive control of the information other fraud plaintiffs are required to plead. (In contrast, the Eighth and Eleventh Circuits apply the plain text of Rule 9(b) without exception.)

3. The Tenth Circuit failed to account for the purposes Rule 9(b) is designed to serve. As this Court has observed, the Rule is meant to protect defendants from the "high risk of abusive litigation" resulting from fraud claims. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 569 n.14 (2007).

First and foremost, Rule 9(b) "guarantee[s] all defendants sufficient information to allow for preparation of a response." *U.S. ex rel. Williams* v. *Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (internal quotation marks omitted); *see* Charles Alan Wright et al., 5A *Federal Practice & Procedure Civil* § 1297 (4th ed. 2018) ("[T]he reference to 'circumstances' in [Rule 9(b)] is to matters such as *the time, place, and contents of the false representations* or omissions, *as well as the identity of the person making the misrepresentation* or failing to make a complete disclosure and what that defendant obtained thereby." (emphases added)). An FCA complaint is subject to a range of potential defenses at the motion to dismiss stage, including absence of a false statement, lack of scienter, non-materiality, and the public disclosure bar. These defenses often turn on the "circumstances" of the alleged fraud. This is especially true for FCA cases based on a

theory of implied certification, which, in a case against a hospital, this Court approved when two conditions are met: "first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Escobar*, 136 S. Ct. at 2001. Without notice of the alleged "circumstances" of the fraud, defendants may have no way to argue that the claims did not make the specific representations or that any specific representations were not misleading half-truths.

Rule 9(b) serves to protect defendants from "fishing expeditions and strike suits," *U.S. ex rel. Bledsoe* v. *Cmty. Health Sys., Inc.*, 501 F.3d 493, 510 (6th Cir. 2007), which is especially important given "that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as 'a pretext to uncover unknown wrongs.' " *U.S. ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004) (citation omitted). "A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate." *U.S. ex rel. Russell* v. *Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 309 (5th Cir. 1999); *see also Wood ex rel. U.S.* v. *Applied Research Assocs., Inc.*, 328 F. App'x 744, 747 (2d Cir. 2009) ("[A relator's] contention, that discovery will unearth information tending to prove his contention of fraud, is precisely what Rule 9(b) attempts to discourage.") (alterations in original, internal quotation marks omitted)). And even when a case moves into discovery, Rule 9(b) is a tool to effectively control the scope of discovery and

limit the litigation costs to defendants and courts. *U.S. ex rel. Clausen* v. *Lab. Corp. of Am.*, 198 F.R.D. 560, 564 (N.D. Ga. 2000) ("The particularity requirement of Rule 9(b), if enforced, will not only protect defendants against strike suits, but will result in claims with discernable boundaries and manageable discovery limits."), *aff'd*, 290 F.3d 1301 (11th Cir. 2002); *see also U.S. ex rel. Spay* v. *CVS Caremark Corp.*, No. 09-4672, 2013 WL 4525226, at *1 (E.D. Pa. Aug. 27, 2013) (limiting discovery to the time period, type of conduct, and geography alleged in the complaint). A relaxed pleading standard forecloses the possibility of such case management in FCA cases.

Importantly, Rule 9(b) provides a standard for courts to discern between "whistle-blowing insiders with genuinely valuable information" and "opportunistic plaintiffs who have no significant information to contribute on their own." *U.S. ex rel. Findley* v. *FPC-Boron Emps. Club*, 105 F.3d 675, 680 (D.C. Cir. 1997) (internal quotation marks omitted); *see also Clausen*, 290 F.3d at 1313 n.24 (permitting a plaintiff "to learn the complaint's bare essentials through discovery * * * may needlessly harm a defendant's goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, [contains] baseless allegations used to extract settlements"). Exception-free application of Rule 9(b) disadvantages only those individuals unequipped to press a *qui tam* suit. There should be no question that " 'insiders privy to a fraud on the government' should have adequate knowledge of the wrongdoing at issue, [and] * * * should be able to comply with Rule 9(b)." *Bly-Magee* v. *California*, 236 F.3d 1014, 1019 (9th Cir. 2001). In this way, Rule 9(b) furthers

the FCA's intent of encouraging those with actual knowledge of false claims to come forward, without creating windfalls for individuals with secondhand conjecture or water cooler gossip about wrongdoing. *U.S. ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 558 (8th Cir. 2006).

All *qui tam* relators must meet the requirements of Rule 9(b). The FCA is designed to reward those with knowledge of fraud with the right to litigate on behalf of the United States. The Court should grant certiorari to restore the Rule 9(b) particularity pleading requirement, as written, to all FCA cases.

II. Community Hospitals Suffer The Harms Of Relaxing Rule 9(b) More Acutely, Causing Resources To Be Shifted Away From Their Core Mission Of Delivering Healthcare.

a. *Qui Tam* Lawsuits Disproportionately Target Healthcare Entities.

The prevalence of *qui tam* cases has ballooned over the past three decades. *See DOJ Fraud Statistics*, *supra*, at 1 (371 new FCA matters in 1987 compared to 767 in 2018). This increase appears to be largely driven by relators. While the United States itself has filed slightly less than one hundred and fifty FCA cases in each of the last few years, *qui tam* relators have filed almost five times as many—680 in 2017 and 645 in 2018. *Id.*

These suits disproportionately target healthcare entities, including *amici*'s members, and as discussed below, most *qui tam* suits are meritless. Of the 767 new FCA cases filed in 2018, for example, 506 involved healthcare defendants. *Id.* at 3 (identifying number of FCA cases involving the Department of Health and Human Services as the primary client

agency). That is nearly *two-thirds* of the new cases filed that year. Moreover, the statistics are even more striking when comparing only relator-filed cases—*nearly seventy percent* of those were filed against healthcare entities. *Id.* at 1, 3 (446 of 645 cases). This stands in stark contrast to 1987, when only 15 of the 371 cases—a mere *four percent*—involved healthcare entities. *Id.*

Hospitals and healthcare organizations are prime targets for abusive *qui tam* lawsuits for three reasons: they are subject to numerous extraordinarily complicated and often ambiguous statutes and regulations; they submit a substantial number of claims (and receive a substantial amount of federal funds) for providing care to individuals participating in federal health programs; and they are longstanding, brick-and-mortar pillars of the community not likely to flee or dissipate their assets.

It is an understatement to say that the Medicare and Medicaid programs are complex and technical. Courts consistently recognize the inordinate challenge posed to hospitals, physicians, and other providers trying to decipher and comply with these rules and regulations. This Court has referred to the statutes governing these programs as "among the most intricate ever drafted by Congress," having a "Byzantine construction" that renders it "almost unintelligible to the uninitiated." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43 (1981) (internal quotation marks omitted). Courts of appeals, in similar fashion, describe Medicare and Medicaid rules as "among the most completely impenetrable texts within human experience," *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536, 541 (7th Cir. 2012) (internal quotation marks omitted), "baffling," *Beverly Cmty.*

Hosp. Ass'n v. *Belshe*, 132 F.3d 1259, 1266 (9th Cir. 1997), and "dense reading of the most tortuous kind" for which "any solid grasp of the matters addressed [is] merely a passing phase." *Rehab. Ass'n of Va., Inc.* v. *Kozlowski,* 42 F.3d 1444, 1450 (4th Cir. 1994). By one count, 130,000 pages of rules govern healthcare providers, with Medicare rules comprising over 100,000 of those pages. Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards As Well As Punishment in Regulatory and Tort Law*, 51 Harv. J. on Legis. 315, 350 (2014). In this context, opportunistic relators see regulatory violations as likely to happen and easily converted to theories of FCA liability.

The likelihood of significant penalties and damages inspires opportunistic *qui tam* relators. Under the FCA's six-year statute of limitations, which some courts have interpreted to be even longer,[3] literally hundreds of thousands of claims can be at issue. Under its treble damages provision, a healthcare provider could be held liable for three times the claimed amount (without regard to the costs the provider actually incurred to provide the services). And today's per-claim penalties are up to $22,363 per claim (and in some states *double* that if Medicaid claims are at issue), meaning that even small dollar claims quickly amount to monumental liabilities. Thus, even where the government suffers little or no actual harm, relators may nevertheless seek enormous penalties based on the view that the FCA requires a separate penalty for each false invoice

[3] *See U.S. ex rel. Hunt* v. *Cochise Consultancy, Inc.*, 887 F.3d 1081 (11th Cir. 2018), *cert. granted*, No. 18-315 (Nov. 16, 2018).

submitted to the government. *See, e.g.*, *United States* v. *Krizek*, 111 F.3d 934, 940 (D.C. Cir. 1997) ("government's definition of claim permitted it to seek an astronomical $81 million worth of [penalties] for alleged actual damages of $245,392"); Joan H. Krause, *"Promises to Keep": Health Care Providers and the Civil False Claims Act*, 23 Cardozo L. Rev. 1363, 1370 (2002) (relators often rely on vast numbers of small-value Medicare or Medicaid claims to threaten astronomical penalties).

The FCA has "proved to be particularly (although perhaps inadvertently) powerful" against doctors, hospitals, and other healthcare providers, "who usually bill on a fee-for-service basis." Joan H. Krause, *Twenty-Five Years of Health Law Through the Lens of the Civil False Claims Act*, 19 Annals Health L. 13, 15 (2010). "[P]hysicians submit thousands of bills for relatively small amounts. * * * For a physician * * * the per-claim penalties may rise quickly * * * ." *Id*. The healthcare industry is thus "particularly susceptible to actions under the False Claims Act due to the many forms health professionals must sign in order to receive compensation from federal health care programs." Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 Tenn. L. Rev. 455, 456 (1998).

Relaxing the Rule 9(b) standard would compound the allure of hospitals and healthcare organizations to opportunistic relators. Given the complexity of the rules and regulations to which they are subject and the way they do business with the government, hospitals and healthcare organizations have an even greater need for the specificity that Rule 9(b) straightforwardly requires.

b. Most *Qui Tam* Suits Are Meritless.

1. Despite the growing number of new *qui tam* cases filed each year, the United States continues to decline to intervene in the overwhelming majority of them. *See* Eric Topor, *Intervention in False Claims Act Lawsuits: Is It Make or Break?*, Bloomberg Law (Apr. 24, 2017)[4]; *see also* U.S. Dep't of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, at 2 (Apr. 18, 2011).[5] The government's failure to intervene "deserves respect because the Government makes such a decision 'if, after assessing the evidence presented by relator and conducting its own preliminary investigation, it believes the action lacks merit.'" *U.S. ex rel. Head* v. *Kane Co.*, 798 F. Supp. 2d 186, 197 n.14 (D.D.C. 2011) (quoting *U.S. ex rel. Purcell* v. *MWI Corp.*, 209 F.R.D. 21, 26 (D.D.C. 2002)).

Relators thus are left to pursue their claims—and their own pecuniary interests—in the name of the United States, but unbridled by government oversight, direction, or prosecutorial discretion. *Cf. Hughes Aircraft Co.* v. *U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("*Qui tam* relators are * * * less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc."); *see also* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation*

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[4] *Available at* https://www.bna.com/intervention-false-claims-n73014460786/.

[5] *Available at* http://www.justice.gov/sites/default/files/usao-edpa/legacy/2011/04/18/fcaprocess2_0.pdf.

Under the Civil False Claims Act, 76 U. Cin. L. Rev. 1233, 1264-65 (2008) ("The result is that the government does not dismiss, and relators are permitted to proceed with, thousands of non-meritorious qui tam suits.").

A substantial number of these declined *qui tam* suits are dismissed or resolved pre-trial, but often only after burdensome and expensive dispositive motion litigation and discovery. According to a comprehensive empirical analysis of suits from 1987 to 2004, 92% of cases in which the U.S. declined to intervene were dismissed without recovery. Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis,* 107 Colum. L. Rev. 949, 974-975 (2007). Thus, less than 10% of non-intervened private *qui tam* actions actually result in recovery, with more than 90% dismissed as frivolous or otherwise without merit. *Id.*; *see also Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 767 n.24 (5th Cir. 2001) (Smith, J., dissenting) (noting that "[o]f the 1,966 [of all *qui tam*] cases that the government has refused to join, only 100 have resulted in recoveries (5%)"); Todd J. Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 9 (2007).

The Department itself has admitted that it "declines to intervene in some cases due to the lack of legal or factual support." U.S. Dep't of Justice, Acting Associate Attorney General Jesse Panuccio Delivers Remarks at the American Bar Association's 12th National Institute on the Civil False Claims Act

and Qui Tam Enforcement (June 14, 2018).[6] DOJ statistics confirm that the vast majority of declined cases do not lead to sizeable recoveries. Since 1987, only five percent of the total amount of recovery from *qui tam* settlements and judgments have come from cases where the government declined to intervene. *See DOJ Fraud Statistics*, *supra*, at 2 (calculated by dividing the total recovery in declined *qui tam* cases by the total recovery in all *qui tam* cases). And the amount is even lower for healthcare cases. *Id.* at 4 (declined cases account for four percent of recoveries). Indeed, "[t]he bulk of the $2.4 billion recovered by the federal government in 2016 from health-care [FCA] settlements and judgments came from cases in which the Justice Department intervened." Topor, *Intervention in False Claims Act Lawsuits*, *supra*.

Relaxing Rule 9(b) in this context only benefits relators where the government declines to intervene—cases which tend to be groundless strike suits or fishing expeditions that do not advance the purposes of the FCA and that Rule 9(b) is generally meant to prevent.

2. Decisions like the one below that relax the Rule 9(b) standard encourage plaintiffs with nothing to offer the government to file opportunistic suits, based largely on conjecture, in hopes of reaping a windfall—and have already spawned an industry of faceless, corporate data-analytics relators seeking to profit by mining Medicare claims data or other publicly available information. These relators have

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[6] *Available at* https://www.justice.gov/opa/speech/acting-associate-attorney-general-jesse-panuccio-delivers-remarks-american-bar.

no personal knowledge of fraud but argue fraud must have occurred based on their slicing-and-dicing of large data sets.

The government recently moved to dismiss 10 such meritless complaints filed by 10 different limited liability companies created by National Health Care Analysis Group (NHCA Group) for the sole purpose of serving as the named relator in *qui tam* suits against pharmaceutical companies. *See* United States' Motion to Dismiss Relator's Second Amended Complaint at 1-2, *U.S. ex rel. Health Choice Grp., LLC* v. *Bayer Corp.*, No. 5:17-cv-00126-RWS-CMC (E.D. Tex. Dec. 17, 2018), ECF No. 116 ("U.S. Bayer Motion"). When NCHA Group's managing agent spoke to the media shortly before filing these actions, he explained that CMS's decision to make Medicare claims data available to the public was "a massive business opportunity" for firms like his to file *qui tam* suits. J.C. Herz, *Medicare Scammers Steal $60 Billion a Year. This Man is Hunting Them*, Wired (Mar. 7, 2016, 6:45 AM).[7]

The problem hospitals now face is that one man's "business opportunity" is another's expensive, meritless lawsuit to fend off. In atypical fashion, the government moved to dismiss the NHCA Group's *qui tams* because "based on its extensive investigation of all of the [NHCA Group] complaints, the government has concluded that the relators' allegations lack sufficient factual and legal support." U.S. Bayer Motion at 14. But this is the exception; the DOJ almost always leaves the burden of dismissing these

[7] *Available at* https://www.wired.com/2016/03/john-mininno-medicare/.

suits to defendants like hospitals, physicians and other healthcare providers.

Another corporate data-analytics relator has specifically targeted hospitals after simply crunching Medicare claims data. *See, e.g.*, Second Amended Complaint, *U.S. ex rel. Integra Med Analytics LLC* v. *Providence Health Servs.*, No. 2:17-cv-01694-PSG-SS (C.D. Cal. Aug. 10, 2018), ECF No. 38 (alleging FCA violations premised on comparative analysis of claims data received from CMS). And this method of mining public information for hints of fraud has been used in other industries as well. *See U.S. ex rel. Customs Fraud Investigations, LLC* v. *Victaulic Co.*, 839 F.3d 242, 256-257 (3d Cir. 2016) (FCA violations from avoiding customs duties pled based on analysis of markings on defendant's pipe-fittings sold in the United States).

It is no coincidence that all of these suits were filed in circuits that have relaxed Rule 9(b)'s standard for *qui tam* relators. Indeed, data-mining relators can easily forum shop by tailoring their allegations and taking advantage of the FCA's broad venue provision. *See* 31 U.S.C. § 3732(a) (FCA action "may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred.").

The incentive created by relaxing Rule 9(b) to file *qui tam* actions based on speculative guesswork—especially guesswork from data analytics companies with no knowledge of any fraud—run counter to the balance Congress struck in the structure of the *qui tam* provisions: "Seeking the golden mean between

adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own * * * ." *Graham Cty. Soil & Water Conservation Dist.* v. *U. S. ex rel. Wilson*, 559 U.S. 280, 294 (2010) (quoting *U.S. ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)); *see also U.S. ex rel. Kinney* v. *Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003) ("The False Claims Act is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing.").

c. Defending *Qui Tam* Actions Is Expensive And Diverts Resources From The Delivery Of Healthcare Services.

Defending declined *qui tam* cases is already extraordinarily expensive and disruptive, and it will become even more so if relators can demand that defendants respond to discovery requests simply by alleging that the defendant has exclusive possession of the records that hypothetically might show the defendant committed fraud. *Qui tam* actions that proceed past a motion to dismiss under a "relaxed" Rule 9(b) are even more expensive than the norm. For example, in 2009, the Seventh Circuit applied its relaxed standard to allow a relator to proceed with a claim based on allegedly defective engine parts, even though the government declined to intervene and the relator failed to plead a "specific request for payment." *U.S. ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009). More than three years later and after "extensive discovery," the district

court granted summary judgment to the defendant because the relator had "no individualized knowledge that a particular part that failed to meet contract specifications was ever sold to the government." *U.S. ex rel. Lusby* v. *Rolls-Royce Corp.*, No. 1:03-cv-680-SEB-WGH, 2012 WL 4357438, at *11 (S.D. Ind. Sept. 24, 2012). "[M]ost non-intervened suits exact a net cost," as defendants expend financial resources to defend against meritless claims and suffer unwarranted harm to their reputations. Rich, *Prosecutorial Indiscretion*, *supra*, at 1264.

Healthcare defendants must assess settlement under the specter of risks unlike those at play in other civil litigation, including the costs of defense, the magnitude of potential liability, and the possibility of an adverse decision resulting in exclusion from participation in federal healthcare programs. *See, e.g.*, 31 U.S.C. §§ 3729(a)(1), 3730(d); 42 U.S.C. §§ 1320a-7, 1396a(a)(39).[8] *See* David A. Hyman, *Health Care Fraud and Abuse: Market Changes, Social Norms, and the Trust "Reposed in the Workmen,"* 30 J. Legal Stud. 531, 552 (2001) ("Providers who believe they are blameless are under tremendous pressure to settle because of * * * the high probability of bankruptcy and professional disgrace if the jury does not see things the same way the provider does."). For healthcare providers, whether settled early or litigated to a conclusion, questionable and meritless FCA cases divert enormous resources away from providers' core responsibility: caring for

[8] Once excluded, entities may not submit claims for items or services and will not be reimbursed for any item or service furnished. 42 C.F.R. § 1001.1901.

patients. *See* Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 131, 172 (2004) ("unjust settlements * * * often include payment of penalties that further divert resources from the provision of health care").

Two hospitals' stories stand as illuminating examples. In 1998, four certified registered nurse anesthetists sued George Washington University, alleging the university's medical center submitted false claims for reimbursement because certain anesthesiologists had not personally performed specific steps of the anesthesia procedure. *U.S. ex rel. El-Amin* v. *George Washington Univ.*, 4 F. Supp. 3d 30, 31-33 (D.D.C. 2013). The case was ultimately resolved entirely in the defendant's favor—but only after *eighteen years* of litigation before three district judges and two magistrate judges, including massive discovery, *id.* at 31, 39-40, that no doubt cost the university many millions of dollars in fees and costs.

As another example, in early 2003, Good Shepherd Medical Center in Hermiston, Oregon, was the subject of an FBI raid after a relator filed a sealed *qui tam* complaint alleging vast irregularities in the hospital's billing practices. *See* Letter from Dennis E. Burke, President, Good Shepherd Health Care System, to Senator Ron Wyden (Aug. 23, 2006).[9] During an arduous three-year investigation of the claims, the alleged irregularities—"unbundling," kickbacks, over-coding, billing for services not provided, among others—dropped away one by one until

[9] *Available at* https://www.aha.org/system/files/2019-02/wydenltr.pdf.

so little of substance remained that the federal government discontinued its investigation. *Id.* at 1-2. An audit of the hospital's emergency billing records revealed that a computer programming error had resulted in the names of the treating ER physician and the hospital's former ER medical director being entered incorrectly on electronic claims forms. That revelation triggered a third-party audit, which showed that all ER services had been provided by qualified physicians and appropriately coded—indeed, sometimes undercoded. *Id.* The hospital incurred over one million dollars in fees and costs relating to the investigation. *Id.* at 2.

There can be no doubt that hospitals have limited resources, whether they are investor-owned or non-profit. One recent study of hospital financial well-being found that non-profit hospital systems produce average operating margins of only 2.52%, and their investor-owned or managed peers fare little better, earning a margin of only 3.38%. *See* Jeff Goldsmith et al., Navigant, *Stiffening Headwinds Challenge Health Systems to Grow Smarter*, at 2 (Sept. 2018).[10] Financial losses at community hospitals from treating Medicare patients in 2016 are more than double those in 2010, Am. Hosp. Ass'n, *TrendWatch Chartbook 2018: Trends Affecting Hospitals and Health Systems*, at 40 (2018),[11] and hospitals' aggregate Medicare margin was negative 9.6% in 2016 and expected to decrease to negative 11% in 2018, MedPAC, *Report to the Congress: Medicare Payment*

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[10] *Available at* https://perma.cc/EC88-PR9Y.

[11] *Available at* https://www.aha.org/guidesreports/2018-05-22-trendwatch-chartbook-2018.

Policy, at 66, 87 (March 2018).[12] At the same time, the costs of providing care and operating hospitals continue to increase. For example, the average amount spent on life-saving drugs for each person admitted to a hospital increased by 18.5 percent between 2015 and 2017, NORC, *Recent Trends in Hospital Drug Spending and Manufacturer Shortages*, at 2 & n.1 (Jan. 15, 2019),[13] and an average-sized community hospital spends nearly $7.6 million annually to comply with federal regulations, Am. Hosp. Ass'n, *Regulatory Overload: Assessing the Regulatory Burden on Health Systems, Hospitals and Post-acute Care Providers*, at 4 (October 2017).[14] With slim margins and increasing operating costs, the threat posed by the cost of defending against a meritless *qui tam* is obvious.

A motion to dismiss is often the defendant's last line of defense against substantial litigation or settlement costs. An exception to Rule 9(b) punches a hole in that line and paves the way for opportunistic relators to pursue meritless *qui tams* and unwarranted windfalls.

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In these circumstances, there is no justification for lowering relators' burden to sufficiently plead their claims. The history of *qui tam* litigation presents strong evidence that the vast majority of *qui*

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[12] *Available at* http://www.medpac.gov/docs/default-source/reports/mar18_medpac_entirereport_sec.pdf?sfvrsn=0.

[13] *Available at* https://www.aha.org/system/files/2019-01/aha-drug-pricing-study-report-01152019_1.pdf.

[14] *Available at* https://www.aha.org/system/files/2018-02/regulatory-overload-report.pdf.

tam suits are meritless. Given that history, a relator in a declined *qui tam* should not be able to plead less than would be expected of the government—the alleged victim. Nor should relators be subject to a more lenient standard than other plaintiffs alleging fraud. When a declined *qui tam* makes it past a motion to dismiss without pleading the circumstances of any fraud, defendants needlessly incur the substantial, at times crippling, costs to defend or even to settle a case that has no merit. Hospitals, *amici*'s members, cannot afford these costs, which will divert resources from their critical core mission of providing patient care. So too, "the government expends significant resources in monitoring [non-intervened] cases and sometimes must produce discovery or otherwise participate" at great expense. Memorandum from Michael D. Granston, Dir., Commercial Lit. Branch, Fraud Section, U.S. Dep't of Justice, at 1 (Jan. 10, 2018).[15]

Allowing a relaxed Rule 9(b) standard to stand will embolden covetous relators to try their luck with meritless claims at the expense of defendants like community hospitals and their patients, who rely on critical services. Rule 9(b) plays a critical role in filtering out meritless FCA actions, but that gatekeeping function is undermined by relaxing the particularity standard in FCA cases.

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[15] *Available at* http://bit.ly/2BHOhRl.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

MELINDA REID HATTON
MAUREEN D. MUDRON
AMERICAN HOSPITAL ASSOCIATION
800 Tenth Street, N.W.
Two CityCenter
Suite 400
Washington, D.C. 20001
(202) 638-1100

Counsel for American Hospital Association

KATHLEEN TENOEVER
ERIN RICHARDSON
FEDERATION OF AMERICAN HOSPITALS
750 9th Street, N.W.
Suite 600
Washington, D.C. 20001
(202) 624-1500

Counsel for Federation of American Hospitals

JONATHAN L. DIESENHAUS
JESSICA L. ELLSWORTH
Counsel of Record
SARAH C. MARBERG
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5886
jessica.ellsworth@hoganlovells.com

Counsel for Amici Curiae

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